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No. _____

IN THE

Supreme Court of the United States

October Term, 2003

THOMAS E. TILLEY and IRIS M. TILLEY,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Thomas E. Tilley
Iris M. Tilley
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Petitioners pro se

QUESTIONS PRESENTED

I. Whether the District Court and Fourth Circuit Panel erred by granting summary judgment in favor of United States when material issues of fact were clearly in dispute, and thereby denying Petitioners their absolute right to trial by jury as mandated by the Seventh Amendment.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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The opinion of the Court of Appeals denying the Petition and Rehearing En Banc is unpublished, entered on March 23, 2004, and is reprinted in Appendix A.

The opinion of the Court of Appeals affirming the District Court's grant of summary judgment in favor of United States is an unpublished, per curiam decision entered on January 15, 2004, and has a secondary citation of *Tilley v. United States*, 85 Fed. Appx. 333; 2004 U.S. App. LEXIS 540; 2004-1 U.S. Tax Cas. (CCH) P50,125; 93 A.F.T.R.2d (RIA) 439. It is reprinted in Appendix B.

The opinion of the District Court granting summary judgment in favor of United States is published as *Tilley v. United States*, 270 F. Supp.2d 731 (M.D.N.C. 2003), entered on July 11, 2003, and it is reprinted in Appendix C.

JURISDICTION

The opinion of the Court of Appeals in this case was filed on March 23, 2004. This petition is therefore timely under Supreme Court Rules 13.1, 13.3, 29.2, & 30.1 if (mailed U.S.P.S. first class) postmarked by June 21, 2004.

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves application of the following statutes, rules, and constitutional provisions.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Constitution, Seventh Amendment.

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

(f) When Affidavits are Unavailable. Should it appear from

the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 56, Fed. Rules Civ. P.

STATEMENT OF THE CASE

On August 1, 2002, Petitioners filed a Complaint for refund of federal income taxes. The United States waived sovereign immunity pursuant to 26 U.S.C. Sections 6213 and 7422(a). Congress vested district courts with jurisdiction pursuant to 28 U.S.C. Section 1346(a)(1). The United States of America was named as a party pursuant to 26 U.S.C. Section 7422(f).

United States moved the District Court for summary judgment, and Petitioners responded in opposition to that motion with substantial evidence. The District Court granted judgment in favor of United States on July 11, 2003. See *Tilley v. United States*, 270 F. Supp.2d 731 (M.D.N.C. 2003).

Petitioners' Notice of Appeal was timely filed on August 5, 2003. Appellate jurisdiction was based upon 28 U.S.C. § 1291. Appellants timely filed their opening brief as instructed by the Fourth Circuit's Order of August 14, 2003.

The panel's per curiam Order affirming the trial court in *Tilley v. United States*, No. 03-1934 (4th Cir. 1/15/04), was filed on January 15, 2004.

Petitioners filed a petition for rehearing with suggestion for rehearing *en banc*. The opinion of the Court of Appeals denying the Petition and Rehearing En Banc was entered on March 23, 2004

This timely petition follows.

REASON FOR GRANTING THE WRIT

The Fourth Circuit Panel's per curiam Order affirming the District Court is in apparent conflict with Supreme Court and Fourth Circuit precedents. Even though the record in the instant matter was replete with disputed issues of material fact, the District Court and the Panel ignored Ruled 56(c)'s requirements that: (1) there is no genuine issue as to any material fact; and (2) he is entitled to judgment as a matter of law. See *Burns v. AAF- McQuay, Inc.*, 96 F.3d 728, 730 (4th Cir. 1996); *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962) (per curiam).

The Court should accept the instant petition because it is necessary to maintain uniformity in the Fourth Circuit decisions and with the Supreme Court precedents. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 255, 91 L. Ed. 2 1 202, 106 S. Ct. 2505 (1986) (a genuine issue exists "if the evidence is such

that a reasonable jury could return a verdict for the nonmoving party"; in considering a motion for summary judgment, the court is required to view the facts and draw reasonable inferences in a light most favorable to the nonmoving party); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); *Patterson v. McLean Credit Union*, 39 F.3d 515, 518 (4th Cir. 1994); *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir. 1994); *Miller v. Leathers*, 913 F.2d 1085, 1087 (4th Cir. 1990), *cert. denied*, 498 U.S. 1109, 112 L. Ed. 2d 1100, 111 S. Ct. 1018 (1991).

The instant Petition involves a question of exceptional importance in the administration of the Federal Rules of Civil Procedure and the trial by jury mandate of the Seventh Amendment. See, e.g., *Ross v. Bernhard*, 396 U.S. 531, 538, 24 L. Ed. 2d 729, 90 S. Ct. 733 (1969); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 473, n. 4, 8 L. Ed. 2d 44, 82 S. Ct. 894 (1962); *United States v. McMullin*, 948 F.2d 1188, 1190 (10th Cir. 1991) (noting "that where the government seeks to reduce a tax assessment to judgment and obtain a personal money judgment against the taxpayer, the taxpayer then has a Seventh Amendment right to a jury trial"); *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1443 (10th Cir. 1988); *United States v. State of New Mexico*, 642 F.2d 397, 399-400 (10th Cir. 1981); *United States v. Anderson*, 584 F.2d 369, 373 (10th Cir. 1978); *United States v. McMahan*, 569 F.2d 889 (5th Cir. 1978).

The Fourth Circuit Panel's Order affirming the District Court is in conflict with each and every other Federal Court of Appeal. See, e.g., *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir.), *cert. denied*, 515 U.S. 1103 (1995); *Hancock v. Dodson*, 958 F.2d 1367, 1374 (6th Cir. 1992); *Federacióón de Empleados Tribunal Gen. de Justicia v. Torres*, 747 F.2d 35, 36 (1st Cir. 1984) (Breyer, J.)

I. THE DISTRICT COURT AND THE FOURTH CIRCUIT PANEL ERRED BY DETERMINING THE ULTIMATE QUESTION OF DISPUTED FACTS AGAINST PETITIONERS IN ORDER TO GRANT SUMMARY JUDGMENT TO UNITED STATES, THEREBY VIOLATING THE SEVENTH AMENDMENT

A. Facts were clearly in dispute.

On June 10, 1999, June 25, 1999, and September 2, 1999, the IRS confiscated funds in the amount of $22,967.73, $51,616.08, and $18,844.45. The IRS administratively seized in excess of $350,000 from the Petitioners for the tax periods 1991, 1992, 1994, and 1995. These administrative confiscations paid the entire amount of tax liability, penalties, and interest for each of the tax periods asserted against the Petitioners. Thomas Tilley did not petition the United States Tax Court for the years 1994 and 1995 when he received the statutory notice of deficiency.

During September 2000, the Petitioners filed an administrative claim for refund. During November 2001, the Petitioners filed a supplement to their administrative claim for refund. The Petitioners asserted, *inter alia*, that they were entitled to a refund because the IRS failed to allow business expenses and personal deductions. The IRS did not allow any of the Petitioners' personal deductions or business expenses for the period 1994 and 1995. The IRS simply ignored the Petitioners' administrative claim for refund.

Thomas Tilley attached as Exhibit A to his declaration true and correct copies of receipts for personal deductions and business expenses for the tax period 1994. Thomas Tilley

attached to his declaration as Exhibit B true and correct copies of receipts for personal deductions and business expenses for the tax period 1995.

Thomas Tilley's substantial evidence disclosed that he was entitled to business expenses and personal deductions before any taxable income could have been determined for 1994 and 1995. Thomas Tilley's testimony was that, "Declarant is attaching as [Exhibit A & B] true and correct copies of receipts for personal deductions and business expenses for the tax period[s] [1994 & 1995]. (Doc. 17, Decl. Tilley, para.'s 21 & 22) Tilley submitted documentation for 1994 and 1995 of: (1) gross receipts from rental property, (2) categories of business expenses with the amounts and total expenses, and (3) supporting records for the business expenses including cancelled checks.

Thomas Tilley's Exhibit A was for the 1994 calendar year and included the following:

DOCUMENT # 1
IRS Form 10[illegible]-MISC, showing the name and address of Thomas Tilley, and showing $119,920.08 in income as "rents" in 1994.

DOCUMENT # 2
A financial statement (7 pages) showing the name and address of "Thomas Tilley" at the top, showing "total expenses," "net operating income," and "cash flow" for rental properties at about twenty different locations.

DOCUMENT # 3
An itemized statement summarizing and totaling the calendar year 1994 business expenses:

Repairs and maintenance	$ 32,121
Insurance	$ 4,358
Fees/licenses Realty Com.	$ 7,195
Interest on credit used	$ 98,805
Other Property taxes	$ 12,352
TOTAL	$ 154,831

DOCUMENT # 4
An "annual information statement" from the Mortgage Company of Virginia, dated 12/30/94 and showing a "tax ID 240-48-0849" and name "Thomas E. Tilley - C/O Jim Willette Kermit manager". The statement indicates "interest paid - 11,211.24" and "IRS amt. 11,211.24".

DOCUMENT # 5
An "annual information statement" from the "Mortgage Company of Virginia," dated 12/30/94 and showing a "tax ID 560-74-7649" and name "Tilley-six Inc. Thomas Tilley." The statement indicates "interest paid - 19,966.56" and "IRS amt. 19,966.56".

DOCUMENT # 6
A "statement of account" from "North Central Farm Credit ACA," dated 12/31/94; showing a customer number ending -0001 and name "Thomas E. Tilley;" and indicating, inter alia, outstanding notes with "interest paid year to date" at $ 10,628.39 and $ 1,087.98.

DOCUMENT # 7
A "statement of account" from "North Central Farm Credit ACA," dated 12/31/94; showing a customer number ending -0002 and name "Thomas E. Tilley;" and indicating, inter alia, an outstanding note with "interest paid year to date" at

$ 15,782.91.

DOCUMENT # 8
A statement from "Yadkin Valley Bank & Trust Co," dated December 31, 1994; showing a customer name Thomas E. Tilley - social security nbr 240480849;" and showing "interest pd interest refund 3,982.93"

DOCUMENT # 9
An "invoice" from "Commercial Equipment, Inc.," dated 09/19/94; listing "Tilley, Thomas E. - Tilley Enterprises" as recipient of a "copier" for a total of $ 352.44.

DOCUMENT # 10
An "Acknowledgement of Charitable Contributions" from "Jerry Falwell The Old Time Gospel Hour/LBN, Inc." showing charitable gifts by "Mr. and Mrs. Thomas Tilley" in 1994 in amounts of $ 180.00 and 129.00, minus "fair market value" of items of $ 15.00 and $ 19.00.

DOCUMENT # 11
A "receipt" from "Campus Crusade for Christ International" showing charitable gifts by "Mr. and Mrs. Thomas Tilley" in 1994 in the amount of $ 480.00.

DOCUMENT # 12
A "page 3" from a form entitled "charitable contributions tax report for the year 1994" from "Cresset Baptist Church," naming "Iris Tilley" in type, and "Thomas Tilley" in handwriting; and showing a total of $ 6,262.00 in contributions.

DOCUMENT # 13
Copies of 32 checks including:

"Farm Bureau" for "insurance,"
"Moore Co Tax Collector" for "property tax,"
"Internal Revenue Service" for "237-04-8039,"
"Liberty University" for "Contribution,"
"Metro Air Conditioning" for "repairs,"
"Robinson, Bradshaw + Hinson" for "Attorney,"

Thomas Tilley's Exhibit B for the 1995 calendar year disclosed: (1) gross receipts from rental property, (2) categories of business expenses with the amounts and total expenses, and (3) supporting records for the business expenses including cancelled checks. Exhibit B included the following documents:

DOCUMENT # 14
IRS Form 1099-MISC, showing the name and address of Thomas Tilley, and showing $ 129,792.19 in income as "rents" in 1995.

DOCUMENT # 15
A financial statement (7 pages) showing the name and address of "Thomas Tilley" at the top, showing "total expenses," "net operating income," and "cash flow" for rental properties at about twenty different locations.

DOCUMENT # 16
An itemized statement summarizing business expenses for the calendar year 1995:

Repair and Maintenance	$ 28,268
Insurance	$ 4,400
Fees/Licenses Realty Com.	$ 7,787
Interest on Credit Used	$ 87,390
Other Property Taxes	$ 12,852

Total $140,831

DOCUMENT # 17
A document, dated 9/07/95, from "Scottsdale Insurance Company - North Carolina Farm Bureau," listing "Tilley, Thomas E." as "insured" and stating "New Annual Premium: 2,534.00."

DOCUMENT # 18
A document showing "1995 total interest paid" at $4,645.60, showing a partial payment stub from Thomas E. Tilley. A different portion of the document showing "the interest paid on this account is $3,203.16" listing "Chemical Financial Management Corporation" and including handwriting showing "Thomas Tilley."

DOCUMENT # 19
An "annual information statement" from the Mortgage Company of Virginia, dated 12/29/95 and showing a "tax ID 240-48-0849" and name "Thomas E. Tilley - T Bruce Tilley". The statement indicates "interest paid - 49857.19" and "IRS amt. 49857.19".

DOCUMENT # 20
An "annual information statement" from the "Mortgage Company of Virginia," dated 12/29/95 and showing a "tax ID 560-74-7649" and name "Tilley-six Inc. Thomas Tilley." The statement indicates "interest paid - 23637.46" and "IRS amt. 23637.46".

DOCUMENT # 21
A Statement from "First Community Bank," of "Forest, VA," listing "Tilley Six Trust" "Tax ID Number 240-48-0849" and "Interest Paid 1,604.60" in the year 1995.

DOCUMENT # 22
An "Annual Statement" (two pages) from "BB&T Mortgage" showing "reported [mortgage] interest to the IRS for 1995" for "Mr Thomas E Tilley - Mrs Iris M Tilley" at $ 2,067.97, and $ 4,133.17.

DOCUMENT # 23
A "1995 year-end giving report" from "Campus Crusade for Christ International" showing charitable gifts by "Mr. and Mrs. Thomas Tilley" in 1995 in the amount of $480.00.

DOCUMENT # 24
A "page 4" from a form entitled "charitable contributions tax report for the year 1995" from "Cresset Baptist Church," naming "Iris Tilley" in type, and "Thomas Tilley" in handwritting; and showing a total of $ 6,213.00 in contributions.

DOCUMENT # 25
An undated letter from "The Heritage Foundation" acknowledging a $25.00 contribution from Thomas Tilley.

DOCUMENT # 26
An "Acknowledgement of Charitable Contributions" from "Jerry Falwell The Old Time Gospel Hour/LBN, Inc." showing charitable gifts by "Mr. and Mrs. Thomas Tilley" in 1995 amounting to $70.00, minus "fair market value" of items of $ 15.00.

DOCUMENT # 27
Copies of 47 checks including:
"N.C. Farm Bureau" for "insurance,"

"Ashe Co Tax Collector" for "property tax,"
"1041 Services" for "CPA,"
"Metro Air Conditioning" for "repairs,"
"Robinson, Bradshaw + Hinson" for "Attorney,"

B. The District Court and Fourth Circuit Panel eviscerated the summary judgment standard.

The District Court and Fourth Circuit Panel has unlawfully and unconstitutionally authorized Thomas Tilley to be taxed on his gross receipts. As the statement of facts clearly disclose, Tilley had substantial deductions to which he was entitled. The District Court and the Fourth Circuit Panel completely ignored the summary judgment standard, altered the statutes of Congress, and illegally sanctioned taxation not authorized as a matter of law.

To prevail on a motion for summary judgment, a party must demonstrate that: (1) there is no genuine issue as to any material fact; and (2) he is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c). The Fourth Circuit is required by the rule of law to review a district court's grant of summary judgment *de novo*, and view the evidence in the light most favorable to the nonmoving party. See *Burns v. AAF- McQuay, Inc.*, 96 F.3d 728, 730 (4th Cir. 1996); *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 8 L. Ed. 2d 176, 82 S. Ct. 993 (1962) (per curiam).

The Fourth Circuit has articulated the summary judgment standard as follows:

> A genuine issue exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248,

> 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). In considering a motion for summary judgment, the court is required to view the facts and draw reasonable inferences in a light most favorable to the nonmoving party. Id. at 255. The plaintiff is entitled to have the credibility of all his evidence presumed. *Miller v. Leathers*, 913 F.2d 1085, 1087 (4th Cir. 1990), *cert. denied*, 498 U.S. 1109, 112 L. Ed. 2d 1100, 111 S. Ct. 1018 (1991). The party seeking summary judgment has the initial burden to show the absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The opposing party must demonstrate that a triable issue of fact exists; he may not rest on mere allegations or denials. *Anderson*, 477 U.S. at 248. A mere scintilla of evidence supporting the case is insufficient. Id.

Patterson v. McLean Credit Union, 39 F.3d 515, 518 (4th Cir. 1994) (quoting *Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir. 1994)).

By completely disregarding the summary judgment standard, the District Court and Fourth Circuit Panel did not assume the veracity and accuracy of Thomas Tilley's declaration and supporting evidence. It should be crystal clear that the lower courts are not deterred by the law. The District Court and the Fourth Circuit Panel also make it clear that they are neither interested in the rule of law nor the Constitution.

Petitioners did not rest on their pleadings. Instead, they unequivocally proved that specific material facts gave rise to genuine issues. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). When considering a motion for summary judgment, federal courts are required by the rule of law to view the record in the light most favorable to the nonmoving party. *Clark v.*

Alexander, 85 F.3d 146, 150 (4th Cir. 1996). Instead, the District Court and Panel of three (3) Justices of the Fourth Circuit viewed the record in the most unfavorable light to Petitioners, the nonmoving party. The District Court and the Fourth Circuit Panel ignored Thomas Tilley's sworn testimony; ignored his evidentiary submissions; destroyed the Federal Rules of Civil Procedure; refused to follow binding Supreme Court precedents; even ignored binding Fourth Circuit precedents; and eviscerated a constitutional right to trial by jury mandated by the Seventh Amendment. Yet, the chorus continues that we are a nation of laws.

Summary judgment shall be denied "[i]f there are ... 'genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.'" *Hancock v. Dodson*, 958 F.2d 1367, 1374 (6th Cir. 1992). Of course, in determining whether a genuine issue of material fact exists, a court must **assume as true the evidence of the nonmoving party and draw all reasonable inferences in the favor of that party**. *Anderson*, 477 U.S. at 255 (emphasis added). Did the District Court and the Panel of three (3) Justices of the Fourth Circuit "assume as true the evidence of [Tilley] and draw all reasonable inferences in the favor of [Tilley]? Absolutely NOT!

Whenever the parties present conflicting evidence, a court **may not** decide which evidence to believe, by determining which parties' affiants are more credible; rather, credibility determinations must be left to the fact-finder. 10A Charles Alan Wright, et al., Federal Practice and Procedure §2726. Yet, in the instant matter, United States did not submit any evidence to rebut the plethora of the Petitioners' evidentiary submissions. There must be some confusion as to the meaning of the phrase "may not decide which evidence to believe," because five (5)

Federal Judges, three of whom sit on one of the highest courts in our Nation, not only disbelieved each and every document submitted by the Petitioners, as well as Thomas Tilley's sworn testimony, but decided in favor of the United States without ANY opposing evidence.

Because the summary judgment standard requires the trial court to make a legal determination **rather than to engage in fact finding**, appellate review is generally governed by the *de novo* standard. See, e.g., *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir.), *cert. denied*, 515 U.S. 1103 (1995). Did the five (5) Federal Judges who rewrote the Federal Rules of Civil Procedure and the Seventh Amendment of the United States Constitution, and who unlawfully sanctioned United States to tax more than permitted by law, engage in "fact finding" rather than making "a legal determination." Of course each and everyone of the Judges did, but that is just the rule of law ignored by all. Each and everyone of these Judges factually found that Thomas Tilley's sworn testimony was not entitled to any verasity. Each and everyone of these Judges factually found that Thomas Tilley's evidentiary submissions substantiating his deductions, and his sworn testimony swearing to same, did not entitle him to one cent of deductions.

In a nonjury case, "the basic dispute between the parties concerns the factual inferences ... that one might draw from the more basic facts to which the parties have drawn the court's attention," ... the district court is freed from the usual constraints that attend the adjudication of summary judgment motions. *Federacióón de Empleados Tribunal Gen. de Justicia v. Torres*, 747 F.2d 35, 36 (1st Cir. 1984) (Breyer, J.). Only in a nonjury case could the District Court engage in a certain amount of differential fact finding, including the sifting of

inferences. In the instant matter, however, Thomas Tilley was entitled to a jury trial. Of course, that is just the rule of law each and every Federal Judge involved in this matter swore to uphold and defend the laws of the United States and the Constitution.

C. The lower courts erred by destroying the Petitioners' Seventh Amendment right to trial by jury.

In order to determine whether a party has a right to a jury trial, courts are required by the rule of law to engage in a two-part inquiry. But in the instant matter that was not a problem, just ignore the rule of law.

First, a court examines the nature of the action and compares it to 18th-century actions brought in England prior to the merger of law and equity. The constitutional guarantee of a jury trial extends to suits at common law – suits tried in 18th-century courts of law. U.S. Const. Amend. VII. But, that is just the rule of law, as well as a constitutional mandate. No problem, just ignore it, as well as each and every Judge's oath of office.

Second, and more importantly, a court must assess the remedy sought and determine whether it is legal or equitable in nature. In general, a claim for money damages is a legal claim requiring a jury trial on demand, while a claim for injunctive relief is deemed an equitable remedy not implicating the right to a trial by jury. See, e.g., *United States v. McMullin*, 948 F.2d 1188, 1190 (10th Cir. 1991) (noting "that where the government seeks to reduce a tax assessment to judgment and obtain a personal money judgment against the taxpayer, the taxpayer then has a Seventh Amendment right to a jury trial"); *United*

States v. Anderson, 584 F.2d 369, 373 (10th Cir. 1978). Even where the government seeks both equitable and legal relief, i.e., foreclosure of a tax lien and a money judgment, the taxpayer under the Seventh Amendment is entitled to a jury trial on the legal issues, i.e., the claim for a money judgment. *Ross v. Bernhard*, 396 U.S. 531, 538, 24 L. Ed. 2d 729, 90 S. Ct. 733 (1969); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 473, n. 4, 8 L. Ed. 2d 44, 82 S. Ct. 894 (1962); *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1443 (10th Cir. 1988); *United States v. State of New Mexico*, 642 F.2d 397, 399-400 (10th Cir. 1981); and *United States v. McMahan*, 569 F.2d 889 (5th Cir. 1978).

Each and every Federal Judge involved in this case, as well as the law clerks and other attorneys being paid by American taxpayers, violated the Seventh Amendment's mandate and their oath of office. The effect of all of the lower courts rulings is that "we determined the disputed facts and decided in favor of the government. The rule of law, our oath of office, and the Seventh Amendment mean nothing to us."

A genuine issue of material fact exists if a rational juror - rather result oriented judges - could decide the disputed allegations in the non-movant's favor based on the evidence presented and the disputed fact might affect the outcome of the suit under the governing law. *Schwartz v. Bhd. of Maint. of Way Employees*, 264 F.3d 1181, 1183 (10th Cir. 2001).

The District Court and the three (3) Justices of the Fourth Circuit unquestionably violated the summary judgment standard by determining the merits of the Petitioners' evidentiary submissions. Petitoners were merely responding in opposition to United States' motion for summary judgment by submitting substantial evidence of gross receipts, business expenses, and some charitable deductions. Thomas Tilley's declaration

summarized by category his business expenses and supported the summaries with documents disclosing his receipts and cancelled checks. The United States did not dispute the accuracy of Thomas Tilley's records. The District Court Judge and the Fourth Circuit Panel disputed the accuracy of Thomas Tilley's records and testimony. Simply stated, the Federal Judges determined the facts, without any opposing evidence from United States, that the Petitioners' evidentiary submissions were meaningless in their entirety.

Accordingly, the District Court and the three (3) Justices of the Fourth Circuit Panel erred by failing to assume as true the evidence submitted by Thomas Tilley – the nonmoving party – and by failing to draw all reasonable inferences in the favor of the Petitioners, thereby denying them their absolute Seventh Amendment right to trial by jury.

Because the District Court and Fourth Circuit Panel eviscerated the rule of law, denied Petitioners' due process of law, and violated Petitioners' Seventh Amendment right to trial by jury, a writ of certiorari should issue.

CONCLUSION

As with everything else in life, individuals are as good as their word, honor, and integrity. The Federal Courts are duty bound to protect and defend the Constitution of the United States, but duty, their oath, honor, and integrity mean nothing to the five (5) Federal Judges involved in the proceedings below.

Despite all the political changes that have taken place in the last century, the dismantling of our constitutional immune system has been largely a judicial project. By removing or

ignoring the barriers erected through the doctrine of enumerated powers, the federal judiciary has exposed the federal government to a flood of political parasites. Having been converted to a national city council, the national government behaves like a city council. The result, not surprisingly, is that the federal government has grown bloated and immobile, as the lifeblood of the citizens goes to nourish thousands of special interests.

That problem was caused in large part by judicial action, and it can be remedied by judicial action. The constitutional safeguards must be restored. An excellent step toward doing so would be to enforce the Constitution and render any laws not conforming to the enumerated powers unconstitutional with strong statements that the Federal Courts will henceforth return to its traditional and constitutional role of policing the boundaries of federal power as the Framers intended.

If the courts fail to do so, it will be ringing the final death knell for the Constitution's system of enumerated powers and limited federal government. That in turn would promote still further growth of federal responsibilities, of special-interest domination, and of governmental bloat and calcification. But that is only part of what will eventually follow.

With the demise of the doctrine of enumerated powers as a restraint on federal power, the only protection remaining for the liberties of citizens not sheltered by powerful lobbying groups is that provided by the positive limitations on government embodied in the Bill of Rights. Those provisions were inserted by pessimists who did not believe – rightly, as it sadly turns out – that the doctrine of enumerated powers would be enough to restrain the federal government over the long term. There is no reason to believe, however, that the Bill of Rights itself will

survive over the long term if the rest of the plan is abandoned.

Indeed, the erosion of the Bills of Rights is already well underway, and the District Court and Fourth Circuit Panel in the instant matter refuses to even enforce the Due Process Clause or the right to jury trial mandated by the Fifth and Seventh Amendments, respectively. As NASA engineers say, once you start relying on the backup systems, you are already in trouble.

What remaining rights will be next? After all, contempt for the Constitution in one area breeds contempt for the Constitution in all areas. A federal government with unlimited responsibilities is likely to demand unlimited power to discharge them and as has already been seen, the Bill of Rights is in its demise. The Framers knew that. We should remember it before it is too late.

Because the District Court's and Fourth Circuit Panel's decision is contrary to Supreme Court precedents; contrary to Fourth Circuit precedents; contrary to all Federal Courts of Appeal; contrary to the rule of law embodied in the Federal Rules of Civil Procedure; and contrary to the mandate of the Seventh Amendment, a writ of certiorari should issue.

DATED: June 15, 2004. Respectfully submitted,

Thomas E. Tilley
Iris M. Tilley

Thomas E. Tilley
Iris M. Tilley
4920 Farrington Road
Chapel Hill, NC 27517
(919) 489-2263

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

THOMAS E. TILLEY; IRIS M. TILLEY,

Plaintiffs - Appellants,

-vs-

UNITED STATES OF AMERICA,

Defendant - Appellee.

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petiton for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel comprised of Judge Shedd, Judge Luttig, and Judge Duncan.

March 23, 2004.

For the Court,

/s/ Patricia S. Connor
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 03-1934

THOMAS E. TILLEY, IRIS M. TILLEY,

Plaintiffs - Appellants,

-vs-

UNITED STATES OF AMERICA,

Defendant - Appellee.

85 Fed. Appx. 333; 2004 U.S. App. LEXIS 540; 2004-1 U.S. Tax Cas. (CCH) P50,125; 93 A.F.T.R.2d (RIA) 439

December 18, 2003, Submitted
January 15, 2004, Decided

NOTICE: RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Middle District of North Carolina, at Durham. (CA-02-629-1). Wallace W. Dixon, Magistrate Judge.

Tilley v. United States, 270 F. Supp. 2d 731, 2003 U.S. Dist. LEXIS 12162 (M.D.N.C., 2003)

DISPOSITION: Affirmed.

COUNSEL: Thomas E. Tilley, Iris M. Tilley, Appellants Pro se.

Charles Bricken, Karen Grace Gregory, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

JUDGES: Before LUTTIG, SHEDD, and DUNCAN, Circuit Judges.

OPINION: PER CURIAM:

Thomas E. Tilley and Iris M. Tilley appeal from the magistrate judge's order * granting summary judgment in favor of the government in the Tilleys' action seeking a refund of income taxes paid for 1991, 1992, 1994, and 1995. On appeal, the Tilleys assert two issues - both concern only Thomas Tilley's tax liability for 1994 and 1995. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the magistrate judge. See *Tilley v. United States, 270 F. Supp. 2d 731 (M.D.N.C. 2003)*. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

* The parties consented to the magistrate judge's jurisdiction under *28 U.S.C. § 636(c) (2000)*.

AFFIRMED

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
1:02CV629

THOMAS E. TILLEY and IRIS M. TILLEY,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

270 F. Supp. 2d 731; 2003 U.S. Dist. LEXIS 12162; 2003-2 U.S. Tax Cas. (CCH) P50,594; 92 A.F.T.R.2d (RIA) 5324

July 11, 2003, Decided
July 11, 2003, Filed

DISPOSITION: Defendant's motion for protective order was granted and Defendant's motion to dismiss and for summary judgment was granted.

COUNSEL: THOMAS E. TILLEY, plaintiff, Pro se, CHAPEL HILL, N.C.

IRIS M. TILLEY, plaintiff, Pro se, CHAPEL HILL, N.C.

For UNITED STATES OF AMERICA, defendant: JOHN W. STONE, JR., OFF CE OF U. S. ATTORNEY, GREENSBORO, NC. JONATHAN D. CARROLL, U. S. DEPARTMENT OF JUSTICE, WASHINGTON, D.C.

JUDGES: WALLACE W. DIXON, United States Magistrate Judge.

OPINIONBY: WALLACE W. DIXON

OPINION:

ORDER

This is an action for refund of taxes, brought by Plaintiffs Thomas E. Tilley and Iris M. Tilley ("Tilleys"). Defendant United States of America ("United States") has filed a motion [Doc. # 13] to dismiss and for summary judgment. The United States has also filed a motion [Doc. # 19] for protective order pursuant to Rule 26(c) protecting it from having to respond to the Tilleys' discovery requests. The parties have consented to the jurisdiction of a magistrate judge under 28 U.S.C. § 636(c). In this posture, the matter is ripe for disposition.

I. Background

In this suit, the Tilleys seek a refund of taxes paid for the tax periods 1991, 1992, 1994 and 1995. The Tilleys timely filed joint returns for the 1991 and 1992 tax periods. By notice of deficiency dated November 14, 1995, the United States determined deficiencies and accuracy-related penalties for 1991 and 1992 totaling $ 84,858. See *Tilley v. Commissioner*, 1997 Tax Ct. Memo LEXIS 258, 73 T.C.M. (CCH) 2763, T.C. Memo. 1997-222 (May 12, 1997). The Tilleys filed a petition with the Tax Court challenging their liability to this sum. The Tax Court determined that the Tilleys were liable for the 1991 and 1992 deficiencies. See *id.*

The Tilleys did not file returns for the 1994 and 1995 tax

periods. By notice of deficiency dated November 14, 1996, the United States determined deficiencies and penalties in the tax of Thomas Tilley for the 1994 and 1995 tax periods. The United States calculated that Thomas Tilley had a taxable income of $ 147,743 in 1994 and $ 133,458 in 1995, resulting in a tax deficiency of $ 87,352, and penalties totaling $ 24,068. (Gov. Ex. 2). Thomas Tilley did not petition the Tax Court concerning the 1994 and 1995 deficiencies.

In 1999, The United States collected the entire amount of the tax and penalties due for the 1991, 1992, 1994 and 1995 tax periods. (See Compl. PVI(b); Gov. Ex. 1). In September 2000, the Tilleys filed an administrative claim for refund, and in November 2001, they filed a supplement to their administrative claim for refund. Receiving no response to their administrative claim for refund, the Tilleys filed suit in this court on August 1, 2002.

In their complaint, the Tilleys argue that they are entitled to a tax refund because:

(1) the statutory notice of deficiency for 1994 and 1995 was invalid, since the IRS failed to file a valid involuntary return for Thomas Tilley;

(2) the IRS failed to issue and serve valid notices of assessments and demands for payments as required by 26 U.S.C. Section 6303(a);

(3) the taxes were unconstitutional, since a tax measured by an individual's so-called income is in the nature of a capitation tax and can only be imposed by apportionment;

(4) the taxes were collected in violation of the Fourth Amendment of the United States Constitution, since an executive warrant was not issued;

(5) the taxes were collected in violation of the Ninth

Amendment of the United States Constitution;

(6) the IRS failed to allow business expenses and personal deductions;

(7) a valid assessment does not exist as a matter of law; and

(8) the taxes were collected in violation of 26 U.S.C. Sections 6320 and 6330, because the IRS failed to hold a collection due process hearing as requested.

(Compl. PVI(d)).

The parties attended a discovery conference on December 9, 2002, and agreed on a discovery plan. In their joint Rule 26(f) report, the parties indicated that discovery would be needed on only one issue, "whether plaintiffs are entitled to business and personal deductions and if so, the amounts." (Doc. # 8, P2). On February 19, 2003, the Tilleys mailed to the United States requests for admissions, interrogatories, and requests for production. In this discovery the Tilleys did not seek information on business or personal deductions, but rather sought admissions and information on the administrative procedures of the Internal Revenue Service (IRS) in handling tax filings, deficiencies, assessments and collections in this case and in general. (See, e.g., Request for Admission # s 13-82; Interrogatory # s 4-20; Request for Production # s 2-14).

Many of the requests for admissions also ask the IRS to give legal statements regarding the Internal Revenue Code. (See, e.g., Request for Admission # 89 ("Admit that the term 'individual' is not defined in the Internal Revenue Code"), # 93 ("Admit that Section 61(a) of the Internal Revenue Code defines 'gross income' as all income from whatever source derived, but does not define income"), and # 94 ("Admit that in the absence of gain, there is no income in the constitutional sense, and thus no 'gross income' under Section 61(a)")).

The United States did not respond to this discovery request, but rather filed a motion to dismiss and for summary judgment on March 21, 2003. The United States moved to dismiss the Tilleys' claims insofar as they relate to the tax years 1991 and 1992, on grounds that the tax liability for this period was previously litigated in Tax Court. The United States also moved for summary judgment on the Tilleys' claim that the IRS failed to conduct a collection due process hearing, on grounds that the Tax Court had already made a determination on this issue. In addition, the United States moved for dismissal of the Tilleys ' claims based on constitutional or procedural defects in the collection process, on grounds that these claims are frivolous. Finally, the United States moved for summary judgment on the Tilleys' claim that they are entitled to business and personal deductions for the years 1994 and 1995, on grounds that they failed to show that they are entitled to deductions for these years. (See United States' Motion to Dismiss and for Summary Judgment, Doc. # 13, pp. 1-2; United States' Brief in Support of its Motion to Dismiss and for Summary Judgment, Doc. # 14 [hereinafter "Br. in Supp."]).

The Tilleys filed a response, accompanied by a Declaration of Thomas Tilley that includes copies of "receipts for personal deductions and business expenses" for the 1994 and 1995 tax periods. (Doc. #'s 16-17 [hereinafter "Pls' Resp." and "Declaration"]). The United States replied, maintaining that the Tilleys have not met their burden of showing that they are entitled to a refund. (Doc. # 18 [hereinafter "Reply"]). The United States also filed, on May 12, 2003, a motion for protective order to protect it from having to respond to the Tilleys' discovery requests.

II. Discussion

A. Protective Order

A protective order under Rule 26(c) to stay discovery pending determination of a dispositive motion is an appropriate exercise of the court's discretion. *Chavous v. District of Columbia Financial Resp. and Mgmt. Asst. Auth.*, 201 F.R.D. 1, 2 (D.D.C. 2001); *Simpson v. Specialty Retail Concepts, Inc.*, 121 F.R.D. 261, 263 (M.D.N.C. 1988); see FED.R.CIV.P. 26(c). The court should not, however, stay discovery which is necessary to gather facts in defense of the motion. 201 F.R.D. at 3; 121 F.R.D. at 263.

In this case, the United States has filed a motion to dismiss and for summary judgment, which, if granted, would dispose of the case. Thus a stay of discovery is appropriate if the discovery requested by the Tilleys is not relevant to the opposition of the motion. n1 To determine whether the discovery sought is irrelevant, the court must examine the merits of the United States' dispositive motion. If the Tilleys' claims fail as a matter of law, or if the discovery sought has no bearing on an issue of material fact, a protective order is proper. For the reasons stated below, the Tilleys' claims fail as a matter of law, and, particularly with regard to the issue of itemized deductions, the discovery sought relating to the IRS's administrative procedures has no bearing on an issue of material fact. Therefore, the United States' motion for protective order will be granted.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 In opposition to the protective order, the Tilleys do not argue that the additional discovery is necessary to oppose the summary judgment motion. Rather, the Tilleys argue that the

motion for protective order should be denied because it was made after the date set for producing the discovery. (Pls' Resp. to Mot. for Prot. Ord., p.3). It is true that, generally, a motion for protective order must be made prior to the date set for the discovery. *Brittain v. Stroh Brewery Co.*, 136 F.R.D. 408, 414 (M.D.N.C. 1991). In this case, though, the United States filed a dispositive motion before the time for producing the discovery had expired, on March 21, 2003. Because the dispositive motion has the potential to dispose of the case without the need for further discovery, it falls within the court's discretion to stay discovery pending resolution of the dispositive motion. *Chavous*, 201 F.R.D. at 2; *Simpson*, 121 F.R.D. at 263.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

B. Motion to Dismiss and Summary Judgment

i. Standard

A claim is subject to dismissal under Rule 12(b)(6) if, under the facts alleged and under any facts that could be proved consistent with the facts alleged, the claim is legally insufficient. *Eastern Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000). In other words, a motion to dismiss allows a court to eliminate claims that are "fatally flawed in their legal premises." *Parham v. Pepsico, Inc.*, 927 F. Supp. 177, 178 (E.D.N.C. 1995). If matters outside the complaint pertaining to the claim are presented to the court, the motion will be treated as one for summary judgment. FED.R.CIV.P. 12(b)(6).

A claim is subject to summary judgment under Rule 56(c), "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the

moving party is entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c). A party seeking summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the [record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Once the moving party has met its burden, the non-moving party must then "set forth specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986) (quoting FED.R.CIV.P. 56(e)).

In making a determination on a summary judgment motion, the court views the evidence in the light most favorable to the non-moving party, according that party the benefit of all reasonable inferences. *Bailey v. Blue Cross & Blue Shield of Virginia*, 67 F.3d 53, 56 (4th Cir. 1995). Nevertheless, judges are not "required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) (citations omitted). Thus, the moving party can bear its burden either by presenting affirmative evidence or by demonstrating that the non-moving party's evidence is insufficient to establish its claim. *Celotex*, 477 U.S. at 331 (Brennan, J., dissenting). "[A] complete failure of proof concerning an essential element of [a plaintiff's] case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 323.

ii. Frivolous Constitutional Claims

Several of the Tilleys' claims are frivolous and fail as a matter of law. In one claim, the Tilleys argue that "the taxes were unconstitutional, since a tax measured by an individual's so-called income is in the nature of a capitation tax and can only be imposed by apportionment." (Compl. PVI(d)(3)). The Sixteenth Amendment puts such an argument to rest, stating:

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

U.S. CONST. amend. XVI (emphasis added). Therefore this claim should be dismissed.

Next, the Tilleys argue that "the taxes were collected in violation of the Fourth Amendment of the United States Constitution, since an executive warrant was not issued," (Compl. PVI(d)(4)). In support of this claim, the Tilleys cite *Soldal v. Cook County*, 506 U.S. 56 n.11, 121 L. Ed. 2d 450, 113 S. Ct. 538 (1992) and *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 351-52, 50 L. Ed. 2d 530, 97 S. Ct. 619 (1997). (See Pls' Resp., pp. 6-7). While it is true, as *Soldal* notes, that the Fourth Amendment "fully applies in the civil context," 506 U.S. at 56 n.11, it is also true, as *G.M. Leasing* states, that no warrant is required by the Fourth Amendment in order to collect taxes by levy under 26 U.S.C. § 6331, provided the levy does not otherwise involve an unconstitutional intrusion of privacy. *G.M. Leasing Corp.*, 429 U.S. at 354; *Nelson v. Silverman*, 888 F. Supp. 1041, 1046 (S.D.Cal., 1995); see also *Bull v. United States*, 295 U.S. 247, 260, 79 L. Ed. 1421, 55 S. Ct. 695, 81 Ct. Cl. 974 (1935) (stating that a tax assessment "is given the force

of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt"); *Den ex dem. Murray v. Hoboken Land & Improv. Co.*, 59 U.S.272, 15 L. Ed.-372 How. (59 U.S.) 272, 15 L. Ed. 372 (1856) (warrant not required for seizure of debtor's land in satisfaction of a claim of the United States). Because the IRS collected the Tilleys' taxes in this case by levy, and the Tilleys have made no allegation that, in order to levy upon their property, any revenue officer entered into their home without consent or invaded any area of expected privacy as defined as a matter of constitutional law, no warrant was required. See *Nelson*, 888 F. Supp. at 1046. Accordingly, the Tilleys' argument is without merit.

Next, the Tilleys argue that "the taxes were collected in violation of the Ninth Amendment of the United States Constitution." (Compl. PVI(d)(5)). The Tilleys have not explained in their brief in opposition to the motion to dismiss what aspect of the Ninth Amendment was violated by the collection of taxes in this case. See U.S. CONST. amend. IX (providing that "the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"). Thus, it is impossible for the court to evaluate the merits of this claim. In any event, the issue of the constitutionality of the collection process set out in the Internal Revenue Code has long been settled. See *Phillips v. Commissioner of Internal Revenue*, 283 U.S. 589, 597, 75 L. Ed. 1289, 51 S. Ct. 608 (1931); *Baddour, Inc. v. United States*, 802 F.2d 801, 807 (5th Cir. 1986); *Stites v. United States Government*, 746 F.2d 1085, 1086 (5th Cir. 1984); *Christensen v. United States*, 733 F. Supp. 844, 850-51 (D.N.J. 1990). Therefore, this claim must be dismissed.

iii. Claims Relating to 1991 and 1992 Tax Liability

Although no single claim by the Tilleys explicitly applies only to the 1991 and 1992 tax periods, several claims can be read, in conjunction with the allegations of the complaint, to challenge tax liability for these years. (See, e.g., Compl., PVI(d)(2), (6), (7) & (8)). The United States correctly points out, and the Tilleys do not dispute, that this court lacks jurisdiction over the Tilleys' claims insofar as they concern their 1991 and 1992 tax liabilities.

The Tilleys previously filed a petition with the Tax Court concerning their 1991 and 1992 income tax liabilities. The Tax Court determined that the income tax liabilities were correct. See *Tilley v. Commissioner*, T.C. Memo 1997-222, 1997 Tax Ct. Memo LEXIS 258, 73 T.C.M. (CCH) 2763; T.C. Memo. 1997-222 (May 12, 1997). Under § 6512(a) of the Internal Revenue Code, because the Tilleys previously filed a petition with the Tax Court "no suit by the taxpayer for the recovery of any part of the tax shall be instituted in any court." 26 U.S.C. § 6512(a); *Solitron Devices v. United States*, 862 F.2d 846, 848 (11th Cir. 1989). Therefore, the Tilleys' claims concerning their 1991 and 1992 tax liabilities must be dismissed.

iv. Notice of Deficiency

The Tilleys next argue that "the statutory notice of deficiency for 1994 and 1995 was invalid, since the IRS failed to file a valid involuntary return for Thomas Tilley." (Compl. PVI(d)(1)). This claim fails as a matter of law because, even if the IRS did not file a valid involuntary return for Thomas Tilley, this does not render the statutory notice of deficiency for 1994 and 1995 invalid.

Contrary to the Tilleys' argument in their brief, § 6020(b)(1) authorizes, but does not require, the IRS to file a substitute return if a taxpayer fails to file a return. *United States v. Verkuilen*, 690 F.2d 648, 657 (7th Cir.1982). The IRS may issue a notice of deficiency without having to file a formal substitute return on behalf of the taxpayer. *Hartman v. Commissioner of Internal Revenue*, 65 T.C. 542, 546 (1975); see *Schiff v. United States*, Civil No. N-86-354(WWE), 89-2 U.S. Tax Cas. (CCH) P9551, 1989 WL 119410, *2, 1989 U.S. Dist. LEXIS 11807, *7 (D. Conn. Sept. 6, 1989) ("A taxpayer's failure to file a return does not bar the determination of a deficiency. When 'a taxpayer files no return, the deficiency can be determined as if a return was made showing the amount of tax to be zero.'") (quoting *Hartman*, 65 T.C. at 546) (emphasis added).

The Notice of Deficiency submitted by the United States in this case, (see Gov. Ex. 2), sets forth in full the explanation and calculation of the deficiency, and gives the Tilleys the right to petition the Tax Court and contest the Commissioner's determination prior to the payment of any taxes. As such, it comports with the statutory requirements for a notice of deficiency. See 26 U.S.C. § 6212. Thus, the Tilleys' claim that the Notice of Deficiency for 1994 and 1995 is invalid is without merit and will be dismissed.

v. Notice of Assessment and Demand for Payment

The Tilleys next claim that "the IRS failed to issue and serve valid notices of assessments and demands for payments as required by 26 U.S.C. Section 6303(a)." (Compl. PVI(d)(2)). n2 Section 6303 provides that "after the making of an assessment of a tax pursuant to section 6203, [the Secretary shall] give notice to each person liable for the unpaid tax, stating the amount and demanding payment thereof." 26 U.S.C. § 6203(a)

(emphasis added). In support of their claim, the Tilleys note that the United States only sent them a letter "stating an amount [and] requesting the recipient to 'please' pay the amount stated." (Pls' Resp., p.8). n3 They argue that § 6303(a) requires more demanding language than "please pay the amount stated" in order to constitute a valid notice and demand for payment.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n2 The Tilleys also state in their seventh claim (Compl., PVI(d)(7)) that "a valid assessment does not exist as a matter of law." The Tilleys do not, however, provide any explanation or argument in support of this claim in their brief in opposition to summary judgment. (See, e.g., Pls' Resp., p.2 (not listing this claim as one of the "factual issues in dispute" in this case)). Therefore, the court finds this claim abandoned, or, at most, subsumed into the related claims discussed in the text. (See Compl., PVI(d)(2) & (6)).

n3 Neither the Tilleys nor the United States provides the court with a hard-copy of this letter, therefore, the court will assume arguendo that the letter contains the precise wording as represented by the Tilleys in their brief.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - -

The Tilleys cite to *United States v. Jersey Shore State Bank*, 781 F.2d 974, 978 (3rd Cir. 1986) and *Toussiant v. Department of the Treasury*, Civil Action No. 91-3150, 1991 U.S. Dist. LEXIS 11275 *8 (D.N.J. Aug. 2, 1991) in support of their contention that a mere request for payment is insufficient to satisfy the requirements of § 6303. In *Jersey Shore State Bank*, the Third Circuit stated:

> A section 6303(a) notice consists of two discrete elements: (i) notice of the amount that has been assessed and (ii) a demand that the individual receiving the notice presently satisfy that assessment. Thus, the plain language of the statute envisions a notice not unlike a typical creditor's dunning letter, providing the individual receiving it with one last opportunity to pay the taxes before the government invokes the full panoply of its administrative collection powers.

781 F.2d at 978. Citing *Jersey Shore*, the court in *Toussiant* determined that certain language in a purported notice letter would not satisfy the requirements of § 6303(a). In particular, the court noted:

> On [May 13, 1991] a purported notice and demand for payment was sent. That document clearly does not contain a demand for payment. At most, it notifies Mr. Toussaint [sic] of the amount due and requests that he "please" make payment in a certain manner. While the Court certainly does not criticize the IRS for endeavoring to be polite to a taxpayer, nevertheless, this "notice" does not satisfy the requirements of § 6303(a).

1991 U.S. Dist. LEXIS 11275 at *8 (emphasis added).

The Tilleys argue that because the demand letter they received included similar language, it, too, does not satisfy the requirements of § 6303(a). This court disagrees, and finds, contrary to the interpretation of the statute set forth in *Toussiant*, that a request to the taxpayer to "please" make a payment of a certain amount is adequate to satisfy the requirements of § 6303. Courts have consistently found that the notice and demand for payment may be made in varying forms.

For example, in *Smith v. Malone*, the court found that "the form on which a section 6303(a) notice and demand is provided is irrelevant as long as it adequately informed the taxpayer of his or her tax liability and requested payment." *Smith v. Malone*, No. C88-340Z, 88-2 U.S. Tax Cas. (CCH) P9540, 1988 U.S. Dist. LEXIS 16378 *6, 1988 WL 126524 *2-3 (W.D.Wash. July 15, 1988) (emphasis added). In *Hughes v. United States*, 953 F.2d 531 (9th Cir. 1992), the Ninth Circuit adopted an equally expansive view of § 6303, stating that notices sent by the IRS "satisfied the requirements of § 6303(a) by informing the [taxpayers] of the amount owed and by requesting payment." *Hughes v. United States*, 953 F.2d 531, 536 (9th Cir. 1992) (emphasis added). Thus, if in this case Mr. Tilley received a letter requesting that he please pay the amount stated, this satisfies the requirements of § 6303(a). Whether the IRS adopted a polite tone and used the word "please" before the request or whether the IRS adopted a more threatening tone is irrelevant, so long as a request for payment was made.

Furthermore, even if the court accepts the interpretation of § 6303 espoused by the Tilleys and *Toussiant*, the flaw in the demand letter, alone, does not invalidate the collection. Indeed, the court in *Toussiant* ultimately found that multiple other notices sent to the taxpayer were adequate to satisfy the requirements of § 6303. After finding the initial demand letter inadequate under § 6303, the court in Toussiant continued its analysis:

> Our inquiry is not ended, however. On or about June 3, 1991, defendant sent and plaintiff received a Notice of Intent to Levy.. . . Although this document was sent pursuant to the requirements of § 6331(d) as a necessary prerequisite to the Notice of Levy served on plaintiff's employer, this document in fact satisfies all the

> requirements of § 6303(a). Unlike [the previous notice], [the Notice of Intent to Levy] unequivocally demands payment of the full liability asserted and warns the plaintiff of the consequences "if full payment is not received within 10 days . . . ."

1991 U.S. Dist. Lexis 11275 at *8 (emphasis added). This approach was also followed by the Ninth Circuit, in *Hughes*. There, the taxpayer did not receive any formal demand letter at all. The taxpayer did, however, receive numerous final notices (notices of intention to levy) as well as notices of deficiencies, notices of liens, a notice of levy, a notice of sealed bid sale, and a notice of garnishment. The Ninth Circuit found that these notices, although not demand letters, satisfied the requirements of § 6303(a). The court explained, "these numerous notices were sufficient because the form on which a notice of assessment and demand for payment is made is irrelevant as long as it provides the taxpayer with all the information required under 26 U.S.C. § 6303(a)." 953 F.2d at 536. n4

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n4 Several additional cases cited by the Tilleys in their brief do not detract from application of this expansive approach. For instance, in *Commissioner v. Shapiro*, 424 U.S. 614, 622 n.7, 47 L. Ed. 2d 278, 96 S. Ct. 1062 (1976), the Supreme Court avoided the issue of whether a proper demand letter was sent, finding instead that a subsequent notice of levy satisfied the statutory demand requirements to make collection valid. See also *Martinez v. United States*, 669 F.2d 568 (9th Cir. 1981) (providing no rule on what language constitutes a "demand," but merely stating that at a minimum, before levy, the taxpayer must be given notice and an opportunity to fail or refuse to pay the tax") (emphasis added); *United States v. Berman*, 825 F.2d

1053, 1055-57 (6th Cir. 1987) (providing no rule on what language constitutes a "demand," and
finding that notices which had been claimed to have been mailed were not, in
fact, mailed).

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In this case, in addition to the letter providing notice of assessment and request for payment, the IRS sent the Tilleys notices of deficiency, several notices of determination concerning collection actions, and a notice of intent to levy and right to hearing stating the United States' intention to proceed with collection by levy. See *Tilley v. Comm'r*, 83 T.C.M. (CCH) 1912, T.C. Memo2002-161 (June 25, 2002); Gov. Exs. 1 & 2. If the more polite request for payment did not satisfy the § 6303(a) requirement, the more urgent notices and demands preceding impending collection actions certainly did. Therefore the court finds that the Tilleys received adequate notice and demand as required by § 6303(a).

vi. Collection Due Process Hearing

Next, the Tilleys claim that "the taxes were collected in violation of 26 U.S.C. Sections 6320 and 6330, because the IRS failed to hold a collection due process hearing as requested." (Compl., PVI(d)(8)). In seeking dismissal of this claim, the United States points out that the Tilleys have previously litigated this claim in Tax Court, and that the Tax Court properly found that the Tilleys had received the collection hearing due under law.

In *Tilley v. Commissioner*, the Tax Court examined the issue of whether the Tilleys had received an opportunity for a hearing as

required by 26 U.S.C. § 6330. 83 T.C.M. (CCH) 1912, T.C. Memo.2002-161, p.3 (June 25, 2002). Section 6330(b) provides:

> (b) Right to fair hearing.
> (1) In general. If the person requests a hearing under subsection (a)(3)(B), such hearing shall be held by the Internal Revenue Service Office of Appeals.
> (2) One hearing per period. A person shall be entitled to only one hearing under this section with respect to the taxable period to which the unpaid tax specified in subsection (a)(3)(A) relates.

26 U.S.C. § 6330(b) (emphasis added). In this case, the Tax Court found that on February 3, 1999, the IRS sent to the Tilleys a notice of intent to levy with respect to the taxable years 1991, 1992, 1994 and 1995. Then, on February 22, 1999, the IRS received the Tilleys' request for a Collection Due Process Hearing with respect to those years. On April 15, 1999, an Appeals Officer "held a telephone conference with Mr. Tilley in response to the request for a collection hearing." 83 T.C.M. (CCH) 1912, T.C. Memo.2002-161, p.5. "Both parties discussed the issues in the request," including the issue of whether Mr. Tilley should be entitled to certain deductions and credits. *Id.*

Mr. Tilley does not dispute these facts, but instead asserts, as he asserted before the Tax Court, that he was not afforded a person-to-person hearing, as he requested in a second written hearing request. (See Declaration of Thomas Tilley, P5). The Tax Court found that, regardless of whether Mr. Tilley had requested a second hearing person-to-person, the requirements of § 6330 had been met through the telephone conference. 83 T.C.M. (CCH) 1912, T.C. Memo.2002-161, p.6. This court

agrees.

In *Katz v. Commissioner*, 115 T.C. 329, 337-38 (2000), the Tax Court specifically found that where the taxpayer and the Appeals Officer had a telephone conference, instead of a face-to-face hearing, in which the taxpayer's arguments were discussed, the taxpayer had received an Appeals hearing as required by law. 115 T.C. at 337-38. Neither the Internal Revenue Code nor the Constitution requires a person-to-person hearing before a levy determination is made, and even a hearing by correspondence is sufficient to satisfy due process. See *Lunsford v. Comm'r*, 117 T.C. 159, 170-74 (2001) (Halpern J., concurring) (explaining basis for rule in administrative law).

In this case, because Mr. Tilley was given the opportunity for a telephone conference in which he discussed the substance of his case with an Appeals Officer, he received the process due under § 6330 and the Constitution. Therefore his claim must be denied as a matter of law.

vii. Failure to Assess Business Expenses and Personal Deductions

Finally, the Tilleys argue that Mr. Tilley n5 is due a refund because the IRS failed to allow business expenses and personal deductions when making the tax assessment for Mr. Tilley for the 1994 and 1995 tax period. (Compl., PVI(d)(8)).

The United States moved for summary judgment on this claim on grounds that the assessments made against Mr. Tilley for 1994 and 1995 are presumptively correct and that Mr. Tilley had not shown how the assessments were incorrect nor what the correct tax liability should be. (Br. in Supp., p.6). In his Response, Mr. Tilley argues that he is entitled to "personal

deductions and business expenses." (Pls' Resp., p.17). In support of this claim, Mr. Tilley filed a sworn Declaration, which includes as attachments "true and correct copies of receipts for personal deductions and business expenses for the tax period[s] 1994 [and 1995]." (Declaration, PP21-22). Mr. Tilley contends that "it is uncontested that the items attached to the declaration of Tilley, which are supported by substantial evidence, are generally deductible." (Pls' Resp., p.17 n.3). In conclusion, Mr. Tilley asserts that "because the IRS did not allow Thomas Tilley to itemize his deductions, this Court must determine the correct amount of his tax liability for 1994 and 1995." (Id., p.19).

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n5 Importantly, although Thomas Tilley and his spouse, Iris Tilley, are plaintiffs together in the refund lawsuit, the IRS made assessments only against Thomas Tilley for 1994 and 1995. Iris Tilley was not assessed liabilities for 1994 or 1995. In seeking a refund based on business expenses and personal deductions, the relevant inquiry will thus be whether Mr. Tilley has met his burden of showing the 1994 and 1995 assessments against him are incorrect and that he is entitled to business expenses and personal deductions.

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In its Reply, the United States asserts that Mr. Tilley has not met his burden to overcome summary judgment. The United States argues that the documents produced by Mr. Tilley do not show the amount of deductions Mr. Tilley is entitled to or his correct tax liabilities. In addition, the United States points out that it is up to Mr. Tilley, not this court, to show "the correct amount of [Mr. Tilley's] tax liability for 1994 and 1995." (See

Reply, pp. 4-5).

In a refund suit, the taxpayer not only bears the burden of proving that the IRS's assessment of taxes was erroneous, but also bears the burden of showing the amount he is entitled to recover. *United States v. Janis*, 428 U.S. 433, 440-41, 49 L. Ed. 2d 1046, 96 S. Ct. 3021 (1976); *Helvering v. Taylor*, 293 U.S. 507, 514 & 515, 79 L. Ed. 623, 55 S. Ct. 287 (1935); *Winstead v. United States*, 109 F.3d 989, 993 (4th Cir. 1997); *Alvary v. United States*, 302 F.2d 790, 795 (2nd Cir. 1962). When the taxpayer seeks a refund on the basis of deductions, the taxpayer must prove the legality and specific amount of each deduction claimed. *Great Northern Nekoosa Corp. v. United States*, 711 F.2d 473, 475 (1st Cir. 1983); *United States v. Pfister*, 205 F.2d 538, 542 (8th Cir. 1953); *Embry v. Gray*, 145 F. Supp. 383, 386 (W.D.Ky. 1956); see *Interstate Transit Lines v. Commissioner*, 319 U.S. 590, 593, 87 L. Ed. 1607, 63 S. Ct. 1279 (1943) ("An income tax deduction is a matter of legislative grace and . . . the burden of clearly showing the right to the claimed deduction is on the taxpayer."); *Niles v. United States*, 710 F.2d 1391, 1393 (9th Cir. 1983) ("The taxpayer bears the burden of showing that he comes within the provisions of a specific deduction.").

In this case, the United States does not take issue with Mr. Tilley's assertion that business expenses and personal deductions are generally deductible, even for the taxpayer who does not file a return. (See Reply; Pls' Resp., p.17 (citing *Robertson v. Commissioner*, 79 T.C.M. (CCH) 1725, T.C. Memo 2000-100 (2000); *Bagby v. Commissioner*, 102 T.C. 596 (1994))). That much is accepted by this court, without further discussion. The key issue in this case, however, is whether the evidence brought forth by Mr. Tilley, in the Declaration of Thomas Tilley, presents a triable issue as to whether Mr. Tilley is entitled to itemized deductions for the 1994 and 1995 tax

years.

Mr. Tilley has attached the following financial documents n6 to his Declaration, which he contends shows that he is entitled to a refund in this case:

Exhibit A (1994 financial documents) includes copies of -

DOCUMENT # 1

IRS Form 1099-MISC, showing the name and address of Thomas Tilley, and showing $ 119,920.08 in income as "rents" in 1994.

DOCUMENT # 2

A financial statement (7 pages) showing the name and address of "Thomas Tilley" at the top, showing "total expenses," "net operating income," and "cash flow" for what appear to be rental properties at about twenty different locations.

DOCUMENT # 3

An itemized statement, with no identifying information, entitled "Schedule B (continued) - year 1994" showing the following information:

Repairs and maintenance	$ 32,121.-
Insurance	$ 4,358.-
Fees/licenses Realty Com.	$ 7,195.-
Interest on credit used	$ 98,805.-
Other Property taxes	$ 12,352.-
***	
TOTAL OF SCHEDULE B	$ 154,831.-

DOCUMENT # 4

An "annual information statement" from the Mortgage Company of Virginia, dated 12/30/94 and showing a "tax ID 240-48-0849" and name "Thomas E. Tilley - C/O Jim Willette Kermit manager". The statement indicates "interest paid - 11211.24" and "IRS amt. 11211.24".

DOCUMENT # 5

An "annual information statement" from the "Mortgage Company of Virginia," dated 12/30/94 and showing a "tax ID 560-74-7649" and name "Tilley-six Inc. Thomas Tilley." The statement indicates "interest paid - 19966.56" and "IRS amt. 19966.56".

DOCUMENT # 6

A "statement of account" from "North Central Farm Credit ACA," dated 12/31/94; showing a customer number ending -0001 and name "Thomas E. Tilley;" and indicating, inter alia, outstanding notes with "interest paid year to date" at $ 10,628.39 and $ 1,087.98.

DOCUMENT # 7

A "statement of account" from "North Central Farm Credit ACA," dated 12/31/94; showing a customer number ending -0002 and name "Thomas E. Tilley;" and indicating, inter alia, an outstanding note with "interest paid year to date" at $ 15,782.91.

DOCUMENT # 8

A statement from "Yadkin Valley Bank & Trust Co," dated December 31, 1994; showing a customer name Thomas E. Tilley - social security nbr 240480849;" and showing "interest pd interest refund 3,982.93"

DOCUMENT # 9

An "invoice" from "Commercial Equipment, Inc.," dated 09/19/94; listing "Tilley, Thomas E. - Tilley Enterprises" as recipient of a "copier" for a total of $ 352.44.

DOCUMENT # 10

An "Acknowledgement of Charitable Contributions" from "Jerry Falwell The Old Time Gospel Hour/LBN, Inc." showing charitable gifts by "Mr. and Mrs. Thomas Tilley" in 1994 in amounts of $ 180.00 and 129.00, minus "fair market value" of items of $ 15.00 and $ 19.00.

DOCUMENT # 11

A "receipt" from "Campus Crusade for Christ International" showing charitable gifts by "Mr. and Mrs. Thomas Tilley" in 1994 in the amount of $ 480.00.

DOCUMENT # 12

A "page 3" from a form entitled "charitable contributions tax report for the year 1994" from "Cresset Baptist Church," naming "Iris Tilley" in type, and "Thomas Tilley" in handwriting; and showing a total of $6,262.00 in contributions.

DOCUMENT # 13

Copies of 32 checks made to the order of various entities in 1994, including

"Farm Bureau" for "insurance,"
"Moore Co Tax Collector" for "property tax,"
"Internal Revenue Service" for "237-04-8039,"
"Liberty University" for "Contribution,"
"Metro [**33] Air Conditioning" for "repairs,"
"Robinson, Bradshaw + Hinson" for "Attorney,"

and indicating "Tilley Enterprises" at the heading of the checks.

Exhibit B (1995 financial documents) includes copies of -

DOCUMENT # 14

IRS Form 1099-MISC, showing the name and address of Thomas Tilley, and showing $ 129,792.19 in income as "rents" in 1995.

DOCUMENT # 15

A financial statement (7 pages) showing the name and address of "Thomas Tilley" at the top, showing "total expenses," "net operating income," and "cash flow" for what appear to be rental properties at about twenty different locations.

DOCUMENT # 16

An itemized statement, with no identifying information entitled "Schedule B (continued) - year 1995" showing the following information:

Repairs and maintenance	$ 28,268.-
Insurance	$ 4,400.-
Fees/licenses Realty Com.	$ 7,787.-
Interest on credit used	$ 87,390.-
Other Property taxes	$ 12,852.-
***	
TOTAL OF SCHEDULE B	$ 140,831.-

DOCUMENT # 17

A document, dated 9/07/95, from "Scottsdale Insurance Company - North Carolina Farm Bureau," listing "Tilley, Thomas E." as "insured" and stating "New Annual Premium:

2,534.00."

DOCUMENT # 18

A document showing "1995 total interest paid" at $ 4645.60, showing a partial payment stub apparently from Thomas E. Tilley, but not showing any payee. A different portion of the document showing "the interest paid on this account is $ 3,203.16" listing "Chemical Financial Management Corporation" and including handwriting showing "Thomas Tilley."

DOCUMENT # 19

An "annual information statement" from the Mortgage Company of Virginia, dated 12/29/95 and showing a "tax ID 240-48-0849" and name "Thomas E. Tilley - T Bruce Tilley". The statement indicates "interest paid - 49857.19" and "IRS amt. 49857.19" [sic].

DOCUMENT # 20

An "annual information statement" from the "Mortgage Company of Virginia," dated 12/29/95 and showing a "tax ID 560-74-7649" and name "Tilley-six Inc. Thomas Tilley." The statement indicates "interest paid - 23637.46" and "IRS amt. 23637.46".

DOCUMENT # 21

A Statement from "First Community Bank," of "Forest, VA," listing "Tilley Six Trust" "Tax ID Number 240-48-0849" and "Interest Paid 1,604.60" in the year 1995.

DOCUMENT # 22

An "Annual Statement" (two pages) from "BB&T Mortgage" showing "reported [mortgage] interest to the IRS for 1995" for "Mr Thomas E Tilley - Mrs Iris M Tilley" at $

2,067.97, and $ 4,133.17.

DOCUMENT # 23

A "1995 year-end giving report" from "Campus Crusade for Christ International" showing charitable gifts by "Mr. and Mrs. Thomas Tilley" in 1995 in the amount of $ 480.00.

DOCUMENT # 24

A "page 4" from a form entitled "charitable contributions tax report for the year 1995" from "Cresset Baptist Church," naming "Iris Tilley" in type, and "Thomas Tilley" in handwritting; and showing a total of $6,213.00 in contributions.

DOCUMENT # 25

An undated letter from "The Heritage Foundation" acknowledging a $25.00 contribution from Thomas Tilley.

DOCUMENT # 26

An "Acknowledgement of Charitable Contributions" from "Jerry Falwell The Old Time Gospel Hour/LBN, Inc." showing charitable gifts by "Mr. and Mrs. Thomas Tilley" in 1995 amounting to $ 70.00, minus "fair market value" of items of $ 15.00.

DOCUMENT # 27

Copies of 47 checks made to the order of various entities in 1995, including, for example,

"N.C. Farm Bureau" for "insurance,"
"Ashe Co Tax Collector" for "property tax,"
"1041 Services" for "CPA,"
"Metro Air Conditioning" for "repairs,"
"Robinson, Bradshaw + Hinson" for "Attorney,"and indicating "Tilley Enterprises" at the heading of the

checks.

(See Declaration, P21 & 22, Exs. A & B).

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n6 The documents attached to the declaration are not numbered, nor are page numbers provided for the documents. For ease of reference, the court will label and refer to the documents attached to the Declaration as "DOCUMENT # 1, . . . DOCUMENT # 2, etc.," in the manner as set out in the text.

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The United States points out several shortcomings in these documents which it claims entitles it to summary judgment. First, the United States argues that "the documents contain inadmissable hearsay and thus are not admissible as evidence." (Reply, p.4). In support of this contention, the United States does not explain which documents or portions of documents contain inadmissable hearsay, and merely cites to the case of *Williams v. Griffin*, 952 F.2d 820, 823 (4th Cir. 1991). Williams, however, does not directly bear on the issue of whether the documents attached to Mr. Tilley's sworn declaration are not admissible as evidence on summary judgment because of hearsay problems. The Fourth Circuit in Williams states:

> As a general rule, when one party files a motion for summary judgment, the non-movant cannot merely rely on matters pleaded in the complaint, but must, by factual affidavit or the like, respond to the motion. However, a verified complaint is the equivalent of an opposing affidavit for summary judgment purposes, when the allegations

contained therein are based on personal knowledge.

952 F.2d at 823. Here, Mr. Tilley has not "merely rel[ied] on matters pleaded in the complaint," id., but has instead, through documents described in and attached to a sworn declaration, responded to the motion. Thus, the general rule in Williams applies, and the documents attached to the Declaration are not barred from consideration based on Williams. The court is otherwise satisfied that, because the documents are certified in the Declaration as "true and correct copies of receipts for personal deductions and business expenses," (Decl. PP21 & 22), the attached documents are, insofar as they are relevant, not barred from consideration on summary judgment. See FED.R.CIV.P. 56(e) (providing that a declarant shall attach to a declaration any "sworn or certified copies of all papers or parts thereof referred to in [the declaration]").

Next, the United States argues that, even if the documents are admissible evidence, many of the documents concern the entity "Tilley Enterprises" but give no explanation of what Tilley Enterprises is or how it relates to Thomas Tilley 's tax liabilities. For instance, Mr. Tilley does not explain what type of entity Tilley Enterprises is, such as whether it is a corporation, sole proprietorship, or Subchapter S entity. Nor does Mr. Tilley explain why he would be entitled to deduct amounts paid by Tilley Enterprises, or what the expenses are for. Similarly, several documents relate to plaintiff Mrs. Iris Tilley, but Mr. Tilley does not explain how financial records relating to Iris Tilley affect deductions for Thomas Tilley. As a result, the United States argues that any documents concerning this entity or Iris Tilley should be disregarded as irrelevant to the tax liabilities of Thomas Tilley.

In addition, the United States argues that the two documents

entitled "Schedule B (continued) 1994" and "Schedule B (continued) 1995" are not explained or fully supported by the other documents provided. In particular, the United States notes that these Schedules report $ 98,805 and $ 87,390 for "interest on credit used," but that "none of the other documents remotely support these amounts." (Reply, p.5).

The court finds the United States' points, insofar as they concern the specific documents mentioned, well taken. It is true that Mr. Tilley never explains what "Tilley Enterprises" is, or how expenses incurred or paid by Tilley Enterprises or Mrs. Tilley can qualify as deductions for Thomas Tilley. Nor does Mr. Tilley explain what a certain "Tilley-Six Inc.," appearing in some of the documents, is, or how expenses incurred or paid by Tilley-Six, Inc., can qualify as deductions for Thomas Tilley. Therefore, as the documents are submitted at this stage of the litigation, the court finds records pertaining to "Tilley Enterprises," Mrs. Iris Tilley, or "Tilley-Six Inc." are not sufficient evidence to satisfy the burden of establishing deductible amounts for Thomas Tilley. See Anderson, 477 U.S. at 251 (stating that, on summary judgment, courts are not "required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party"). In particular, this means that the following documents submitted by Thomas Tilley do not satisfy the burden of showing deductible amounts for Thomas Tilley:

Document # 5 (statement from Mortgage Company of Virginia)

Document # 9 (invoice)

Document # 10 (charitable contribution)

Document # 11 (charitable contribution)

Document # 12 (charitable contribution)

Document # 13 (32 checks)

Document # 20 (statement from Mortgage Company of Virginia)

Document # 21 (statement from First Community Bank)

Document # 22 (BB&T Mortgage)

Document # 23 (charitable contribution)

Document # 24 (charitable contribution)

Document # 26 (charitable contribution)

Document # 27 (47 checks)

In addition, two of the remaining documents labeled "Schedule B" (Document #s 3 & 16) are not helpful because they do not contain any identifying information. Nor do these documents contain any explanation or cross-reference to other documents which might provide a basis for the numbers indicated on "Schedule B." Nor is there any explanation of why Mr. Tilley has included a page labeled "continued" but has not included the previous pages to this document. Accordingly, the court finds that the documents labeled "Schedule B" (Document # s 3 & 16), as they are in their current form, do not satisfy the burden of establishing deductible amounts for Thomas Tilley.

The remaining documents do not suffer from the same flaws as those described above. For instance, the remaining documents all identify Thomas Tilley as the sole payor of certain expenses or interest incurred during the tax years 1994 and 1995. (See Document # s 1, 2, 4, 6-8, 14, 15, 17-19, 25). Nevertheless, apart from pointing out faults in individual documents, the United States claims that, by merely attaching receipts and financial records to his Declaration, Mr. Tilley has not met his burden to show exactly what Thomas Tilley's correct liabilities for 1994 and 1995 are. The court agrees.

Although Mr. Tilley has provided some documents that appear to show expenses paid by him in 1994 and 1995, Mr. Tilley has never stated, much less justified in any clearly ordered detail, what his deductions should be for the 1994 and 1995 tax years. Nor has Mr. Tilley shown how these deductions balance out against the rental and other income (e.g., $ 119,920 in rental income in 1994 and $ 26,720 in interest income in 1994) found in the Notice of Deficiency and tax assessments made by the IRS. (Gov. Exs. 1 & 2). n7 In turn, Mr. Tilley has not shown what his correct taxable income should be, nor what his corrected tax liability, and resulting refund if any, should be.

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n7 The IRS's assessment that Mr. Tilley received income from dividends, interest, patronages, and rents in 1994 and 1995 is entitled to a presumption of correctness, see *Helvering v. Taylor*, 293 U.S. at 515, and the documents submitted by Mr. Tilley do nothing to rebut this presumption. Indeed, Document #s 1 & 14 go so far as to confirm the rental income assessed in 1994 and 1995.

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The lack of specificity in Mr. Tilley's claim is highlighted by the argument he sets out in his brief in opposition to summary judgment. Mr. Tilley's argument that he is entitled to deductions for 1994 and 1995 spans almost five pages. These five pages, however, are almost entirely taken up by a discussion of why he should, as a general matter, be permitted to make personal deductions even though he did not file a return for 1994 and 1995. (Br. in Resp., pp. 15-19). As the court noted before, this proposition is undisputed. Noticeably lacking, though, is any discussion of which deductions apply to Mr. Tilley in this case, the amounts of each deduction, and which documents support each deduction.

Mr. Tilley makes only one conclusory statement in a footnote regarding the documents attached to the Declaration. In particular he writes:

> It is uncontested that the items attached to the declaration of Tilley, which are supported by substantial evidence, are generally deductible. See, e.g., 26 U.S.C. § 213(a) (deduction for expenses paid for medical care of the individual, his or her spouse, or a dependent); § 164(a)(1) (deduction for real property taxes); § 164(a)(2) (deduction for state and local property taxes and ad valorem auto license [**44] fee); § 162(a) (deduction for all ordinary and necessary expenses incurred in carrying on a trade or business); § 163(a) deduction for interest paid or incurred on indebtedness); § 163(h)(2)(D) (deduction for interest on a qualified residence); etc.

(Pls' Resp., p.17, n.3). This statement is insufficient to demonstrate the types and amounts of deductions in this case. Notably, Mr. Tilley makes no attempt to show how the statutory deductions listed after "see, e.g.," apply to his case at all. For

instance, no document attached to the Declaration pertains to "expenses paid for the medical care" of any Tilley family member. 26 U.S.C. § 213(a). Nor does there appear to be any document pertaining to an ad valorem auto license fee. § 164(a)(2). Nor is it apparent what other statutory deductions (designated by the "etc." used by Mr. Tilley) apply to Mr. Tilley for the 1994 and 1995 tax period. Furthermore, although some of the documents in the Declaration might apply to one of the other statutory deductions listed, Mr. Tilley has failed to show which documents apply to which deductions and in what amounts. Finally, Mr. Tilley's statement that "the items attached to the declaration . . . are generally deductible," (Pls' Resp., p.17, n. 3) (emphasis added), only further emphasizes the flaw in Mr. Tilley's argument, namely that he has not shown that the items attached to the declaration are specifically deductible in this case.

In sum, the court finds that, although some documents submitted by Mr. Tilley appear to relate to business and personal expenses paid by Mr. Tilley during the 1994 and 1995 tax years, Mr. Tilley has failed to provide sufficient evidence to satisfy his burden of clearly showing how these expenses relate to his tax liability and refund due. It is not the role of this court (or the jury) to set out and calculate Mr. Tilley's itemized deductions on his behalf. See *Hefti v. IRS*, 8 F.3d 1169, 1173 & 1174 (7th Cir. 1993) (noting that unless the taxpayer files a "detailed statement" providing the grounds for the deductions, as well as documentation substantiating the deductions claimed, no meaningful review of a claim for refund is possible). Accordingly, the United States is entitled to summary judgment as to Mr. Tilley's claim for a refund on the basis of itemized deductions.

III. Conclusion

The Tilleys' claims for a refund fail as a matter of law. Furthermore, the discovery sought has no bearing on the outcome of these claims, both because the claims fail as a matter of law and, especially in the case of the claim for deductions, because the discovery has no relevance to the issue in the claim.

For the forgoing reasons, Defendant's motion [Doc. # 19] for protective order is GRANTED and Defendant's motion [Doc. # 13] to dismiss and for summary judgment is GRANTED.

A judgment will be entered simultaneously herewith.

So ordered.

WALLACE W. DIXON

United States Magistrate Judge

July 11, 2003